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8 **United States District Court**
9 **Central District of California**

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11 ASHAMAD PINCHEM,

12 Plaintiff,

13 v.

14 REGAL MEDICAL GROUP, INC.,

15 Defendant.
16

Case № 2:15-cv-06518-ODW (KLSx)

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT [25]**

17 **I. INTRODUCTION**

18 This is an action under the Telephone Consumer Protection Act, 47 U.S.C.
19 § 227 ("TCPA"). Defendant Regal Medical Group, Inc., an organization that receives
20 and responds to medical care requests for participants in HMO insurance plans,
21 inadvertently entered Plaintiff Ashamad Pinchem's cellphone number as the fax
22 number of Dr. Cindy Huang in its database. Over the next 23 months, Regal
23 attempted to send over 5,800 "faxes" Plaintiff's cellphone number, most of which
24 were responses to medical care requests submitted by Dr. Huang. Unsurprisingly,
25 Plaintiff sued. Regal now moves for summary judgment, arguing that fax
26 transmissions are not "calls" under the TCPA, and that in any event its calling system
27 is not an "automatic telephone dialing system" ("ATDS") under the TCPA. For the
28 reasons discussed below, the Court **GRANTS IN PART** and **DENIES IN PART**

1 Regal's Motion for Summary Judgment. (ECF No. 25.)¹

2 **II. BACKGROUND**

3 Regal is an independent practice association which arranges and pays for
 4 medical care to members of HMO insurance plans. (Statement of Undisputed Facts
 5 ("SUF") 1, ECF No. 44-3.) To this end, Regal contracts with thousands of physicians,
 6 including Dr. Cindy Huang. (SUF 2, 6.) One of Regal's primary functions is to
 7 authorize or deny medical service requests from its contracted healthcare providers.
 8 (SUF 3.) A provider may submit a request through a portal called Access Express.²
 9 (SUF 18.) Some requests are automatically approved by Access Express (i.e., without
 10 any human review) if the request meets certain criteria. (SUF 21.) Most requests,
 11 however, must be reviewed by a coordinator, a nurse, or a doctor. (SUF 22.) That is,
 12 a coordinator will login to Access Express to view the request, will "finalize" the
 13 request (e.g., by obtaining any missing or inaccurate information from the provider,
 14 correcting typos in the request, etc.), and will either approve the request or escalate it
 15 to a nurse or doctor for approval or denial. (SUF 23–27, 32, 34.) Once a final
 16 decision on the request is made, it is manually submitted (i.e., by a human) to Access
 17 Express, which then automatically generates a response letter to the healthcare
 18 provider. (SUF 33.)

19 Regal uses four programs in order to fax out the letter: EZ-Cap, Access
 20 Express, XMedius, and adTempus. (SUF 92.) EZ-Cap is a database that stores the
 21 fax numbers of Regal's contracted providers. (SUF 95.) Access Express generates
 22 the response letter to the healthcare provider once a decision to deny or approve the
 23 request is made. (SUF 101, 102.) Access Express controls the method of delivery
 24 (i.e., fax or mail); the sender has no control over the method of delivery. (SUF 103.)

26 ¹ After considering the papers filed in connection with the Motion, the Court deemed the matter
 27 appropriate for decision without oral argument. Fed. R. Civ. P. 78(b); C.D. Cal. L.R. 7-15.

28 ² The provider may also submit a request by telephone or fax, in which case a Regal employee
 will manually enter the request into the portal for processing. (SUF 19, 20.)

1 When Access Express determines that the letter will be sent by fax, another computer
2 program pulls the appropriate fax number from EZ-Cap into Access Express on a
3 preset schedule. (SUF 97.) Both the letter and the fax number are then placed in a
4 queue. (SUF 104.) At the front of the queue, adTempus transfers both the letter and
5 the fax number to XMedius. (SUF 105, 106.) XMedius places the fax into another
6 queue based on a preset priority. (SUF 107.)³ When the fax reaches the front of this
7 queue, XMedius dials the corresponding number. (SUF 108.) If the fax attempt is
8 unsuccessful, XMedius will put the fax back into the queue and will attempt to resend
9 it up to three times (for a total of four attempts). (*Id.*) After four failed attempts,
10 XMedius automatically informs adTempus that the fax has failed. (*Id.*) adTempus
11 then instructs XMedius to reattempt to send the fax. (SUF 109.) This cycle repeats
12 four times, resulting in sixteen total attempts per fax.⁴ (SUF 109, 110.) After sixteen
13 unsuccessful attempts, adTempus sends the letter back to Access Express, which then
14 sends the letter out by mail instead. (SUF 111.)

15 At some point, Regal inadvertently entered Plaintiff's cellphone number as Dr.
16 Huang's fax number in the EZ-Cap database. (SUF 4.) Thus, between September
17 2013 and August 2015, Regal attempted to fax 500 authorization letters to Plaintiff's
18 cellphone. (SUF 5, 7, 43.) 80 of these letters were "automatic approval" letters that
19 did not go through any human review; the remaining 420 letters were reviewed by a
20 coordinator, nurse, or doctor. (SUF 44, 48.) In addition, Regal attempted to fax 26
21 other letters to Plaintiff's cellphone: 17 were part of a group fax sent by Regal's
22 Information Technology Department at the request of a Regal employee, and 9 were
23 direct fax attempts by a Regal employee. (SUF 7, 51–54.) The IT Department could
24 send group faxes directly through XMedius. (SUF 51.) The Regal employees could

25 ³ Regal employees have no control over where a given fax goes in the queue. (SUF 107.)

26 ⁴ Regal asserts that sometime between September 2013 and August 2015, adTempus was
27 modified such that it would permit a maximum of only twelve attempts per fax. (SUF 41.) Plaintiff
28 disputes this, and contends that the fax logs demonstrate that XMedius attempted to send each fax to
him sixteen times all the way through August 2015. The Court finds this difference immaterial.

1 also send faxes directly through XMedius by manually entering in the recipient's fax
 2 number and clicking "send." (SUF 50, 53.) Plaintiff contends that in total, Regal
 3 made 5,810 fax attempts to his cellphone. (SUF 74.)

4 **III. LEGAL STANDARD**

5 A court "shall grant summary judgment if the movant shows that there is no
 6 genuine dispute as to any material fact and the movant is entitled to judgment as a
 7 matter of law." Fed. R. Civ. P. 56(a). Courts must view the facts and draw reasonable
 8 inferences in the light most favorable to the nonmoving party. *Scott v. Harris*, 550
 9 U.S. 372, 378 (2007). A disputed fact is "material" where the resolution of that fact
 10 might affect the outcome of the suit under the governing law, and the dispute is
 11 "genuine" where "the evidence is such that a reasonable jury could return a verdict for
 12 the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1968).
 13 Conclusory or speculative testimony in affidavits is insufficient to raise genuine issues
 14 of fact and defeat summary judgment. *Thornhill's Publ'g Co. v. GTE Corp.*, 594 F.2d
 15 730, 738 (9th Cir. 1979). Moreover, though the court may not weigh conflicting
 16 evidence or make credibility determinations, there must be more than a mere scintilla
 17 of contradictory evidence to survive summary judgment. *Addisu v. Fred Meyer*, 198
 18 F.3d 1130, 1134 (9th Cir. 2000). Where the moving and nonmoving parties' versions
 19 of events differ, courts are required to view the facts and draw reasonable inferences
 20 in the light most favorable to the nonmoving party. *Scott*, 550 U.S. at 378.

21 **IV. DISCUSSION**

22 Regal argues that fax transmissions are not "calls" under the TCPA, and that its
 23 calling system is not an "automatic telephone dialing system." The Court concludes
 24 that Regal's system was not functioning as an ATDS when employees used it to send
 25 out the nine faxes directly to Plaintiff. However, the Court otherwise disagrees with
 26 Regal's arguments.

27 **A. Whether Attempted Faxes are "Calls"**

28 Regal argues that attempted faxes are not "calls" within the meaning of 47

1 U.S.C. § 227(b)(1)(A).⁵ (Mot. at 14–16.) The Court disagrees.

2 The TCPA provision regulating calls to cellphones provides as follows:

3 It shall be unlawful for any person within the United States, or any
4 person outside the United States if the recipient is within the United
5 States--

6 (A) to make *any call* (other than a call made for emergency purposes
7 or made with the prior express consent of the called party) using any
8 automatic telephone dialing system or an artificial or prerecorded voice--

9 . . .
(iii) to any telephone number assigned to a . . . cellular telephone
service

10 47 U.S.C. § 227(b)(1)(A)(iii) (emphasis added).

11 The TCPA does not define “call,” and the parties have not pointed to any
12 interpretive order or regulation from the Federal Communications Commission that
13 expressly interprets “call” to mean attempted facsimile transmissions. However, the
14 Ninth Circuit has construed the word broadly based on its dictionary definition and
15 Congress’ purpose of prohibiting invasions of privacy via unsolicited telephone
16 communications. *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 953 (9th Cir.
17 2009) (noting that “call” is defined as “to communicate with try to get into
18 communication with a person by a telephone,” and construing the term to include text
19 messages). Similarly, the FCC has held that “the plain language of section
20 227(b)(1)(A)(iii) prohibits the use of autodialers to make any call to a wireless number
21 . . . this prohibition applies *regardless of the content of the call*, and is not limited only
22 to calls that constitute ‘telephone solicitations.’” *In the Matter of Rules & Regulations*
23 *Implementing the Tel. Consumer Prot. Act of 1991*, 23 F.C.C. Rcd. 559, 565 (2008)
24 (emphasis added). This broad interpretation is buttressed by Congress’ use of the
25 word “*any call*,” § 227(b)(1)(A) (emphasis added). *See also Definition of “any”*,

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27 ⁵ Regal also contends that § 227(b)(1)(C) does not apply because that subsection prohibits only
28 the sending of advertisements, which Regal’s faxes were not. (SUF 8.) Plaintiff does not dispute
that the faxes are not advertisements, and thus subsection (b)(1)(C) does not apply. (*Id.*)

Merriam-Webster's Dictionary, https://www.merriam-webster.com/dictionary/any?utm_campaign=sd&utm_medium=serp&utm_source=jso nld (last visited Jan. 2, 2017) (defining "any" in part as "unmeasured or unlimited in amount, number, or extent; appreciably large or extended").

Given this broad interpretation, the Court concludes that an attempt to send a facsimile transmission to a cellphone constitutes a "call" within the meaning of the TCPA. A fax transmission is simply a telephone call that contains data rather than spoken word. And, like a traditional phone call, that data is intended to express a message to the recipient through a telephone line. That the content of a fax message is decipherable only by another fax machine does not take it out of the purview of the TCPA when inadvertently⁶ sent to a cellphone number. The annoyance and cost to the recipient of receiving the attempted fax is still the same.

B. Whether Regal Used an "Automatic Telephone Dialing System"

The parties dispute whether Regal's fax system constitutes an ATDS. "The term 'automatic telephone dialing system' means equipment which has the capacity-- (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C. § 227(a)(1). Since Congress enacted the TCPA, however, technological advances have made this definition somewhat obsolete, for modern dialers tend to make calls from call lists rather than from self-generated numbers. *See generally Luna v. Shac, LLC*, 122 F. Supp. 3d 936, 939 (N.D. Cal. 2015). Thus, the FCC has broadly interpreted this definition to include "any equipment that has the specified *capacity* to generate numbers and dial them without human intervention regardless of whether the numbers called are randomly or sequentially generated or come from calling lists." *In the*

⁶ The Court also notes there is no intent requirement for TCPA violations. *See Penzer v. Transp. Ins. Co.*, 545 F.3d 1303, 1311 (11th Cir. 2008) ("[T]he TCPA does not require intent, except when awarding treble damages."); *Universal Underwriters Ins. Co. v. Lou Fusz Auto. Network, Inc.*, 401 F.3d 876, 882 (8th Cir. 2005) ("[I]ntent is not a prerequisite to liability under the Act.").

1 *Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*,
 2 Declaratory Ruling, 27 F.C.C. Rcd. 15,391, 15,392 n.5 (2012); *see also Sherman v.*
 3 *Yahoo! Inc.*, 150 F. Supp. 3d 1213, 1217 (S.D. Cal. 2015). Instead, the FCC has
 4 emphasized that focus of the inquiry is whether the particular fax system can “‘dial
 5 numbers without human intervention’ and . . . ‘dial thousands of numbers in a short
 6 period of time.’” *In the Matter of Rules & Regulations Implementing the Tel.*
 7 *Consumer Prot. Act of 1991*, 30 F.C.C. Rcd. 7961, ¶ 17 (2015). While the FCC has
 8 rejected a *per se* human intervention requirement, *id.* ¶ 20, the degree of human
 9 intervention required to make the call remains the “primary consideration” in whether
 10 the system constitutes an ATDS. *Jenkins v. mGage, LLC*, No. 1:14-CV-2791-WSD,
 11 2016 WL 4263937, at *6 (N.D. Ga. Aug. 12, 2016). “How the human intervention
 12 element applies to a particular piece of equipment is specific to each individual piece
 13 of equipment, based on how the equipment functions and depends on human
 14 intervention, and is therefore a case-by-case determination.” 30 F.C.C. Rcd. 7961,
 15 ¶ 17. Whether a particular system constitutes an ATDS is a question of fact.
 16 *Satterfield*, 569 F.3d at 951 (reversing district court’s grant of summary judgment
 17 based on “genuine issue[s] of material fact whether this telephone system has the
 18 request capacity to be considered an ATDS under the TCPA”); *Sherman*, 150 F. Supp.
 19 3d at 1217 (denying summary judgment because “[a] reasonable jury could conclude
 20 that the Welcome text is produced and sent by an ATDS as the term is defined in the
 21 TCPA”).

22 Regal does not argue that its faxing system does not have the “capacity” to
 23 generate random or sequential numbers. Rather, Regal argues that the significant
 24 human intervention required to send out faxes takes it outside the definition of an
 25 ATDS. (Mot. at 16–24.)

26 **1. 80 Automatic Response Letters**

27 The Court denies summary judgment as to these letters as there is clearly no
 28 significant human involved in the generation and sending of automatic approval

1 letters. Regal's Access Express program automatically generates an approval letter
2 for medical requests that meet certain preset criteria, which is then queued up and
3 faxed out using an automated system. The only human intervention is the submission
4 of the request by the medical provider, but such intervention alone is too attenuated to
5 conclude that these faxes were not the product of an ATDS system. *See Sherman*, 150
6 F. Supp. 3d at 1217 (Yahoo user entering his cellphone number into a Yahoo
7 database, causing him to receive automated text messages, did not constitute sufficient
8 human intervention to warrant summary judgment).

9 **2. 420 Reviewed Response Letters**

10 While the issue is closer with respect to the reviewed response letters, a
11 reasonable factfinder could still conclude that the process constitutes an ATDS. There
12 is undoubtedly human involvement in the preparation of the letter and initial decision
13 to fax the letter to a specific medical provider, which weighs against a finding that
14 Regal's faxing system is an ATDS. However, because there are substantial additional
15 automated steps required to complete the fax transmission, the Court finds summary
16 judgment inappropriate. A web of computer programs operate to: (1) store the
17 provider's fax number; (2) decide whether to fax or mail the letter out; (3) select the
18 appropriate fax number for transmission from a database of numbers; (4) decide when
19 to attempt to fax the letter out; (5) decide whether a fax attempt was successful, and
20 thus whether to reattempt the fax; and (6) decide how many attempts to make before
21 giving up and mailing the letter out. These factors set them apart from other cases
22 granting summary judgment on this issue. *See, e.g., Jenkins*, 2016 WL 4263937, at *6
23 (granting summary judgment only where "direct human intervention [wa]s required to
24 send each text message immediately or to select the time and date when, in the future,
25 the text message will be sent"); *Luna*, 122 F. Supp. 3d at 941 (granting summary
26 judgment where human intervention was involved in "drafting the message,
27 *determining the timing of the message*, and clicking 'send' on the website to transmit
28 the message to Plaintiff" (emphasis added)); *see also Sterk v. Path, Inc.*, 46 F. Supp.

3d 813, 819 (N.D. Ill. 2014) (“It is the ultimate calling from the list by the automated equipment that is the violation of the TCPA.”). This is also more than simple repeat dialing, which one court has held is insufficient to render the system an ATDS. *See Wattie-Bey v. Modern Recovery Sols.*, No. 1:14-CV-01769, 2016 WL 1253489, at *4 (M.D. Pa. Mar. 10, 2016). The Court therefore denies the Motion with respect to these faxes.

3. 26 Other Faxes

The remaining 26 faxes comprise of the 17 faxes sent by Regal’s IT Department as part of a group fax, and the 9 faxes manually sent by individual Regal employees directly to Plaintiff. Regal is not entitled to summary judgment on the 17 faxes that it sent to Plaintiff as part of a group fax. Regal appears to suggest that the method for sending such group faxes substantially differs from the method of sending the medical service response letters, but gives no information on exactly how such group faxes are sent besides stating that it is done through XMedius. (SUF 51.) Moreover, the fact that these 17 faxes were sent as part of a group fax makes them more, not less, like an ATDS. 30 F.C.C. Rcd. 7961, ¶ 17 (noting that a defining characteristic of an ATDS is the ability to send multiple faxes over a short period of time). Thus, Regal has not met its burden of showing that it is entitled to summary judgment on those 17 faxes. However, the Court concludes that summary judgment is appropriate for the 9 faxes that Regal employees sent to XMedius directly to be faxed to Plaintiff. In those instances, the employee had to manually enter in the recipient’s fax number, and would receive a notice stating whether or not the fax was successful. Thus, Regal’s system is clearly not functioning as an ATDS system when sending such faxes.

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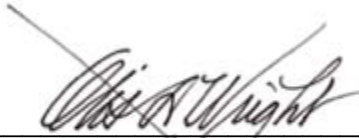
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1 **V. CONCLUSION**

2 For the foregoing reasons, the Court **GRANTS** Regal's Motion with respect to
3 the 9 faxes that Regal employees sent directly to XMedius to be faxed to Plaintiff.
4 The Court **DENIES** the Motion in all other respects. (ECF No. 25.)

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6 **IT IS SO ORDERED.**

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8 January 9, 2017

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11 **OTIS D. WRIGHT, II**
12 **UNITED STATES DISTRICT JUDGE**
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